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No. 99-1987

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,

v.

ANGELICA ROSE PALANK,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

This brief of the Association of American Railroads is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

91 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry.

One matter which is a serious and growing concern to railroads is the frequency with which civil juries are punishing defendants in general, and railroads in particular, through the imposition of substantial punitive damages awards. Railroads have a presence in 49 states, where 559 freight railroads operate over nearly 170,000 miles of track.[2] If an accident occurs involving a member of the general public, railroads usually are subject to lawsuits under state law.[3] In 1998, railroad accidents resulted in 1047 such lawsuits being filed.[4] These suits typically are brought by rail passengers, motorists involved in grade crossing accidents or trespassers on railroad property. In many such cases railroads are tempting targets for punitive damages because their extensive interstate operations often put them in a position to be portrayed in the litigation as wealthy out-of-state corporations. *See infra pp.* 6-8.

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[2] Association of American Railroads, *Railroad Facts* 3 (1999 ed.). Amtrak, the nation's intercity passenger railroad, operates over 24,500 miles of track, most of which is owned by freight railroads. *Id.* at 77.

[3] Railroads generally are regulated under federal law, including the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, which covers injuries to employees. However, state tort law usually applies in cases where non-employees are injured, though, depending on the circumstances, some claims may be preempted. *See e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993)(state law duties to select and install crossing warning devices preempted when federal funds are used to install the devices, and state claims that a train was operated at an excessive rate of speed preempted when train was traveling within the federal track speed limits); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983) (state law claim that locomotive should have been equipped with strobe and oscillating lights not required by federal regulation was preempted).

[4] Association of American Railroads, *1998 Claim & Litigation Report* 3-7 & 3-8 (Aug. 1999).

AAR has a particular interest in this case because it resulted in an immense ($50 million) punitive damages award against one of its member railroads, exceeding by $19 million the highest previous punitive damages award in the state. *See* Petition at 10. This verdict followed a trial marred by highly prejudicial error, in which the court permitted respondent's counsel to urge the jury to return an award of punitive damages based on personnel decisions made by petitioner outside the forum state. The state appellate court's approval of this outcome, left undisturbed by the state's highest court, all but ignored this Court's admonition that "a State may not impose economic sanctions on violations of its law with the intent of changing the tortfeasor's lawful conduct in other States."[5] While the appellate court approved this tactic as simply showing the defendant's motive, *CSX Transp. v. Palank*, 743 So. 2d 556, 560 (Fla. App. 1999), the proceeding below clearly amounted to the state levying an unconstitutional punishment based on the defendant's extraterritorial conduct. Moreover, through this punishment, the state court is attempting to influence national railroad policy by taking aim at legitimate conduct that has long been the subject of federal oversight. *See infra* Part II. As a representative of an industry whose large members each face exposure to substantial punitive damages in numerous states, AAR has an interest in assuring that the constitutional rights of civil defendants are clearly defined and preserved.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case of Petitioner.

SUMMARY OF THE ARGUMENT

In this case, arising from a railroad accident, the court allowed the plaintiff, in the course of a plea to the jury to return a large award of punitive damages, repeatedly to urge that the defendant be punished for lawful conduct undertaken in

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[5] *BMW of North America v. Gore*, 517 U.S. 559, 572 (1996).

numerous states. This tactic, approved by the state appellate court, violated the important constitutional principle, enunciated by this Court, that a state may not exact a punishment on civil defendants based on conduct outside the state's borders. The court's erroneous ruling resulted in an immense punitive damages award of $50 million.

The award in this case was not an isolated incident: in recent years, a number of multimillion dollars punitive damages awards have been returned against railroads. Large railroads conduct business in multiple states, and their operations, of necessity, must be uniform throughout their systems. Thus, railroads are particularly susceptible to being punished for conduct that occurred outside the state where the conduct giving rise to the cause of action occurred. Without guidance from this Court on the constitutional limits on punitive damages where the defendant operates in multiple states, railroads and numerous other defendants will continue to be so exposed.

Not only did the jury target extraterritorial conduct, it sought to punish legitimate personnel decisions that have long been the subject of federal regulation. In this case, the conduct at issue was reduction in the railroad's workforce that occurred during a time of industry consolidation that followed a major deregulatory effort by Congress. In various statutory enactments, Congress has long acknowledged the benefits of railroad consolidation and recognized that it inevitably would lead to force reductions, specifically making provisions to assist affected employees. To permit a jury to use a railroad's system-wide force reductions as a basis for assessing punitive damages is an improper attempt by the state to influence national rail policy, as well as a deprivation of the defendant's constitutional r[illegible]s.

ARGUMENT

I. AS COMPANIES WITH EXTENSIVE INTERSTATE OPERATIONS RAILROADS HAVE A STRONG INTEREST IN ASSURING THAT STATES ARE PROHIBITED FROM PUNISHING EXTRATERRITORIAL CONDUCT IN DISREGARD OF THE CONSTITUTIONAL PRINCIPLES ENUNCIATED IN *BMW V. GORE*

In disregard of this Court's rulings on the constitutional principles applicable to state awards of punitive damages, the court below has sent a loud and clear message to all interstate railroads that their conduct in every state in which they do business, however legitimate, may serve as the basis for punishment in any other state in which they operate. At the trial below, urging a jury to return a substantial punitive damages award against CSX Transportation, respondent asked the jury members to focus on a lawful activity undertaken over a period of years by CSX and its predecessor railroads: reductions in force occurring in a consolidating, and newly deregulated, industry. *See* Petition at 3. As a benchmark for the punishment it was asked to mete out, the jury was further entreated to focus on a specific monetary figure, allegedly related to force reductions throughout the entire CSX rail system, an area covering numerous states. *See id.* Allowance of this tactic in a trial on punitive damages, without so much as a jury instruction on the limits of a state's authority to punish civil defendants, runs afoul of this Court's recent punitive damages jurisprudence and deprived the petitioner of its constitutional rights. *See infra* pp. 9-10.

A. Railroads Have Increasingly Become Targets for Punitive Damages

The punitive damages award returned against petitioner in this case was not an isolated event for the railroad industry: in recent years, the threat of large punitive damages awards has

been transformed from an academic consideration to a reality of doing business, with profound financial consequences for the nation's railroads.[6] Last year, a Missouri jury awarded the staggering sum of $120 million in punitive damages to a plaintiff injured in an accident at a rail-highway grade crossing between an Amtrak train and an automobile in which she was a passenger. *Alcorn v. Union Pacific R.R.*, No. CV-97-31927 (Circuit Court, Jackson County, Mo.) (The court has reduced the award of punitive damages to $50 million and an appeal is pending in the Missouri Supreme Court.) Of almost equal size was a punitive damages award of $44 million in a case arising from a crossing accident in El Paso, Texas. *Atchison, Topeka & Santa Fe Ry. v. Cruz*, No. 08-97-00639-CV (County Court at Law No. 4, El Paso County, Tx.) (An appellate court subsequently struck the award of punitive damages. An appeal to the Texas Supreme Court is pending.)

States have moved aggressively to punish railroads and shape their conduct even where it is questionable that a legal duty has been breached. For example, a six million dollar punitive damages award was assessed against Conrail by a jury in Ohio, and upheld by a state appellate court, as the result of a grade crossing accident in which the railroad was alleged to have failed to install adequate warning devices at a crossing which had been upgraded with federal funds. *Garrett v. Consolidated Rail Corp.*, 697 N.E.2d 1109 (Ohio App. 1997), *discretionary*

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[6] The recent wave of crushing punitive damages awards has come as the rail industry continues a two-decade long trend of greatly improved safety. Notably, during the twenty year period between 1979 and 1998, the number of railroad accidents declined by 72 percent, Federal Railroad Administration, *Accident/Incident Bulletin, Calendar Year 1979* at 9 (1980)(Table H3) and Federal Railroad Administration, *Railroad Safety Statistics, Annual Report 1998* (July 1999) (*1998 Safety Statistics*) ch.1, p. 7 (Table 1-1), and the number of fatalities from grade crossing accidents decreased by 48 percent. Federal Railroad Administration, *Highway-Rail Crossing Accident/Incident and Inventory Bulletin, Calendar Year 1979* at 8 (1980)(Table 3) and *1998 Safety Statistics* at ch. 7, p.6 (Table 7-1).

appeal denied, 686 N.E.2d 273 (1998). The court held that Conrail could be liable for punitive damages because it did not "voluntarily [take] steps to evaluate the safety of its crossings nor independently upgrade its hazardous crossings without an order from the PUCO" (the state agency with jurisdiction over rail-highway grade crossings). 697 N.E.2d at 1124. The punishment stood even though this Court has left no doubt that because federal funds participated in the installation of the crossing warning devices, Conrail's conduct could not even have served as the basis for finding breach of a duty, let alone rise to the level of misconduct required to justify punitive damages. *Norfolk Southern Ry. v. Shanklin*, 120 S. Ct. 1467 (2000). ("What States cannot do once they have installed federally funded devices at a particular crossing—is hold the railroad responsible for the adequacy of those devices." 120 S.Ct. at 1476.)[7]

More recently, the courts in Ohio let stand a punitive damages award of $15 million against Conrail in another case arising out of a grade crossing accident (a liability which has now been acquired by the Norfolk Southern Railroad).[8] *Wightman v. Consolidated Rail Corp.*, 715 N.E.2d 546 (Ohio 1999), *cert.*

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[7] Though *Shanklin* was decided subsequent to the ruling in *Garrett*, *Shanklin* merely reaffirmed this Court's 1993 holding in *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993), which preceded *Garrett* by several years. Moreover, at the time *Garrett* was decided, three U.S. Courts of Appeal had held that participation of federal funds in the installation of crossing warning devices preempted state law claims of the nature made in *Garrett*. *See Hester v. CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 815 (1996); *Elrod v. Burlington Northern R.R.*, 68 F.3d 241 (8th Cir. 1996); *Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188 (10th Cir. 1996). At very least, there was a serious question as to whether the railroad's conduct was even tortious, but that did not deter the state court from approving not just the finding of liability, but also the jury's severe punishment.

[8] Since the verdicts in *Garrett* and *Wightman*, part of Conrail has been acquired by Norfolk Southern.

denied, 120 S.Ct. 1286 (2000). In *Wightman*, the Ohio court permitted a plaintiff's expert to opine to the jury about other unspecified similar accidents that had occurred nationwide, *id.* at 551-52, no doubt opening the door for the jury to punish the defendant for conduct occurring in other states. This was particularly egregious because, in addition to having occurred in other states, these other incidents most likely did not even involve the defendant.[9]

Perhaps the most stunning verdict against a railroad was a punitive damages award of $2.5 billion in Louisiana, also against petitioner, in a case arising from a leaking tank car, owned by another company, that happened to be on the property of CSX at the time. *In re New Orleans Train Car Leakage Fire Litigation*, No. 87-16374 (Civil District Court for the Parish of Orleans, La.). This incident resulted in the precautionary, temporary evacuation of several thousand people from their homes, but caused no serious injuries. In a ruling on post trial motions, the court recently reduced the punitive damages award to a "mere" $850 million.[10] Even as this case and others wend their way through the appellate process, civil juries are being asked to punish railroads with alarming frequency (one large railroad has reported to AAR that it is defending about 70 pending lawsuits in which punitive damages are being sought), and in substantial amounts. *E.g.*, *Hawkins and Cox v. Illinois Central R.R.*, No. 95-0217 (Circuit Court, Holmes County, Ms.)

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[9] In another case where Conrail was assessed multiple seven-figure punitive damages awards arising from a crossing accident, the driver of the car was found to be 55% at fault. *Moore v. Consolidated Rail Corp.*, Nos. 1995CV01185; 1995CV01196; 199600016 (Court of Common Pleas, Stark County, Ohio), *aff'd*, Nos. 1996-CA-00317; 1996-CA-00323 (1996 Ohio App.), *discretionary appeal denied*, 688 N.E.2d 1043 (1998).

[10] This represented the punitive damages against only one railroad, CSX Transportaion. Additional punitive damages awards, exceeding $100 million, were made against other railroads with some connection to the incident. These other railroads ultimately settled the case while post trial motions were pending.

(Plaintiffs are seeking $45 million in punitive damages in a lawsuit arising from a crossing accident.)

B. The Punitive Damages Award In This Case Should Be Reviewed By This Court Because It Violates The Prohibition Against States Punishing Civil Defendants For Extraterritorial Conduct

The prevalence of multimillion dollar punitive damages awards against railroads has heightened the industry's concern over the disregard that some lower courts have shown for this Court's rulings on the constitutional safeguards that must be adhered to in trials on punitive damages. This Court has made it clear that when states seek to impose punishment in civil trials, the defendants are entitled to the protections of the Due Process clause of the constitution. "[I]t is not disputed that a jury award [of punitive damages] may not be upheld . . . if it was reached in proceedings lacking the basic elements of fundamental fairness." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 9 (1991) (quoting *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989)). In *BMW of North America v. Gore*, 517 U.S. 559 (1996), this Court held that the Due Process Clause prohibits a State from imposing punitive damages that are " 'grossly excessive' in relation to" the state's legitimate interest in punishment and deterrence of a tortfeasor's conduct. *Id.* at 568.

Any inquiry into the constitutionality of an award of punitive damages must first identify and evaluate the state's interests that are served by the punishment, which of necessity are limited to protecting its own citizens. *Id.* at 568-572. This Court explained that because a state may not legislate, or punish, beyond the bounds of its jurisdiction, punitive damages may not be assessed with the aim of affecting the defendant's conduct in

other states, *id.* at 569-74,[11] regardless of whether the state's own citizens might be affected by the defendant's conduct when they traveled to another state.[12] In *BMW*, the Alabama Supreme Court had ordered a remittitur of the jury's award to eliminate the portion of the punitive damages award based on the defendant's conduct outside of Alabama. Thus, beyond noting that the Alabama court "correctly concluded that it was error for the jury to use the number of sales in other States as a multiplier in computing the amount of its punitive sanction," this Court did not address in any detail how a state may properly measure punitive damages against a defendant that engages in activities beyond the state's borders.[13]

Guidance on this important issue is essential because today it is probably the exception rather than the rule where a defendant does not conduct business or other activities outside the forum state. Certainly this is the case with the nation's freight railroads and Amtrak, whose operations cover a large number of states.[14] Moreover, because of the nature of their operations, a

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[11] This Court also explained that a state's attempt to reach conduct beyond its borders improperly burdens interstate commerce. 517 U.S. at 571-72. The principle that the constitution precludes states from imposing a penalty calculated to punish or deter a civil defendant's conduct occurring beyond the state's borders was followed by the Tenth Circuit in *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997)("[T]he punitive damage award must relate to conduct occurring within the state." 101 F.3d at 636), a holding rejected outright by the court below. *See* Petition at 12.

[12] 517 U.S. 571, n. 16, citing *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975).

[13] 517 U.S. at 574, n. 21. This Court went on to hold that when limited to Alabama's legitimate interests in punishment and deterrence, the reduced award of $2 million was still "grossly excessive."

[14] The nations four largest freight railroads all have operations in over 20 states. *See* Class I Railroad Annual Report for 1999 (Form R-1) of Burlington Northern Santa Fe; CSX Transportation; Norfolk Southern Railroad; and Union Pacific Railroad, submitted to the Surface

railroad's policies and practices must be consistent and cohesive throughout its system: thus, virtually every action a railroad takes in a particular jurisdiction is likely to be mirrored in other states. Inasmuch as ever-increasing awards of punitive damages against railroads (and other defendants) with a multi-state presence have become a common occurrence, this Court should take the opportunity presented by this case to articulate the constitutional limits on a state court's authority to impose punishment aimed at a defendant's extraterritorial conduct.

II. THE AWARD BELOW PUNISHED CONDUCT WHICH HAS LONG BEEN CONTEMPLATED BY THE NATIONAL RAILROAD POLICY SET BY CONGRESS

The need for this Court to clarify the permissible limits of states' authority to punish tortfeasors for extraterritorial conduct has particular salience for railroads, not only because of their recent experience with punitive damages verdicts, but also because they are the archetypal instrumentality of interstate commerce. Railroads have historically been, and to some extent remain, pervasively regulated at the federal level, beginning in the Nineteenth Century with the Interstate Commerce Act of 1887, c.104, 24 Stat. 379 (1887). Indeed, the guiding principle of federal regulation of the railroads has been Congress' recognition that in order for the national rail network to operate efficiently and effectively, uniformity with regard to operations must be maintained.[15] To the extent state juries are permitted to

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Transportation Board. Amtrak operates in 45 states nationwide. *See* Amtrak Website, http://www.amtrak.com/news/pr/factsheet.html.

[15] *See* 49 U.S.C. § 20106 "Laws, regulations and orders related to railroad safety shall be nationally uniform to the extent practicable." The Interstate Commerce Commission Termination Act of 1995 grants exclusive jurisdiction to the Surface Transportation Board (the federal agency that assumed the remaining functions of the Interstate Commerce Commission when the latter agency was abolished) over virtually every aspect of rail operations. 49 U.S.C. § 10501(b).

consider a railroad's system-wide conduct as a basis for exacting punishment for harm occurring within the state's borders, it raises the specter not just of states imposing their "own policy choices on neighboring States" *BMW supra*, 517 U.S. at 571, but also on national railroad policy.

Of particular relevance to this case is that as part of its national regulatory scheme, Congress has long contemplated consolidation of the railroad industry and has seen reductions in the railroad workforce as a legitimate and inevitable consequence of such consolidation. As early as 1920, Congress recognized that rationalization of the railroad industry would be necessary to its continued viability and gave the Interstate Commerce Commission (ICC) jurisdiction over railroad mergers, consolidations and abandonments. Transportation Act of 1920, § 1(18), 41 Stat. 456 (1920); *See Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 486, 492 (1968) ("[E]ncouraging consolidation of the Nation's railroads" had been a congressional policy for over 45 years.). Congress further recognized that consolidation brings job loss, and during the high unemployment of the depression imposed a moratorium on job reductions in the Emergency Railroad Transportation Act of 1933. *See New York Dock Ry. v. United States*, 609 F.2d 83, 86 (2nd Cir. 1979). This was followed by the implementation of private agreements between railroads and employee organizations granting certain protections to employees to ameliorate the impact of consolidations.[16] The ICC soon began routinely to impose labor protection as a condition of approval of railroad transactions. *See United States v. Lowden*, 308 U.S. 225 (1939) (Upholding the ICC's authority to impose labor protection conditions in a consolidation.) Shortly thereafter, in the Transportation Act of 1940, § 5(2)(f), 54 Stat. 898 (1940),

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[16] Part of the Washington Job Protection Agreement of 1936 (WJPA), these protections took the form of severance payments and other benefits for varying periods of time after the transaction. *See New York Dock*, 609 F.2d at 86-87, for a background and summary of the WJPA.

Congress mandated protection of employees as a condition of approval of mergers, consolidations and acquisitions. In the ensuing years, the railroad industry has continued to rationalize, and, in anticipation of this trend, federal law has continued to mandate certain levels of employee protection as a condition of the underlying transactions. 49 U.S.C. § 11326; *See New York Dock Ry.-Control-Brooklyn Eastern Dist. Ter.*, 360 I.C.C. 60 (1979) (Establishing labor protection conditions in railroad acquisitions.)

After Congress approved substantial economic deregulation of the railroad industry through the Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, 90 Stat. 31 (1976), and the Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 (1980), the ICC implemented a policy which favored railroad mergers that improved efficiency and disfavored imposing conditions on a merger that might reduce potential efficiency gains. *See Lamoille Valley R.R. v. I.C.C.*, 711 F.2d 295, 301 (D.C. Cir. 1983). Not surprisingly, this coincided with the time frame of the force reductions undertaken by petitioner and its predecessors, the conduct which served as the benchmark for the $50 million punishment assessed by the jury.[17] Thus, the reductions in force which petitioner and its predecessor companies had engaged in were not only legal and legitimate outcomes of approved transactions, they were contemplated by Congress in establishing national rail policy and by the regulatory agencies in implementing congressional policy. *See Missouri-Kansas-Texas R.R. v. United States*, 632 F.2d 392, 410 (5th Cir. 1980). ("The operating efficiencies created by railroad mergers often result in a loss of positions for current employees.")

Rail consolidations and force reductions have been within the purview of federal policy for 80 years, and though federal law

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[17] The force reductions for which respondent urged the jury to punish petitioner occurred primarily during the decade immediately subsequent to enactment of the Staggers Act.

does not mandate force reductions of any particular scope, holding out a lawful activity undertaken in numerous states, and fully contemplated by federal public policy makers, as the basis for calculating punitive damages in a state tort action, goes well beyond the limits of a state's authority and improperly punishes for conduct occurring in sister states, contrary to this Court's ruling in *BMW*. If it was improper for an Alabama jury to use the sales of automobiles (and the revenues derived therefrom) in other states as a calculus for punishing BMW for conduct related to sales in Alabama, it is equally impermissible for any other single state to look to force reductions occurring in numerous other states (and the savings allegedly derived therefrom) to punish CSX for an accident that occurred in a single state. Consistent with due process, if a state deems it appropriate to punish a railroad for the alleged consequences of its conduct (be it operational, personnel or other practices or decisions), as this Court has ruled, the scope of the penalty may not be based on legitimate conduct that occurred in other states.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the District Court of Appeal of Florida should be granted.

Respectfully submitted,

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